PP

v.

ROSLAN SABU

HIGH COURT KANGAR, PERLIS
VINCENT NG J
[CRIMINAL TRIAL NO: 45-02-1998]
4 AUGUST 1999

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1) - Trafficking in 1,346.6 g of cannabis - Whether only 64 g or the entire 1,346.6 g of cannabis was examined by chemist - Whether doubt thereof should be resolved in favour of accused - Whether accused entitled to an amended charge under s. 6 - Arrest of four persons pursuant to information obtained from accused - Whether inference drawn that accused was trafficking in said drug*

The accused was charged under s. 39B(1) of the Dangerous Drugs Act 1952 ('the DDA') for trafficking in 1,346.6 g of cannabis.

The issues, *inter alia*, were: (i) whether only 64 g or the entire 1,346.6 g of cannabis was examined by the government chemist and whether the doubt thereof should be resolved in favour of the accused; (ii) whether the accused was entitled to an amended charge under s. 6 of the DDA; and (iii) whether it could be inferred from the arrest of four persons pursuant to information obtained from the accused that the accused was distributing and thereby trafficking in cannabis.

Held:

[1] The sum total of the accused's defence constituted a bare denial. His story was not credible and was incapable of raising even a reasonable doubt in the court's mind in regard to the circumstances of his apprehension and arrest.

[2] The elementary nature of the substance of the alleged offending exhibits has to be proved to the high standard of beyond reasonable doubt. The prosecution did make out a *prima facie* case of the accused having custody and control of 1,346.6 g of cannabis. However, whether only 64 g or the entire 1,346.6 g was examined microscopically was in doubt. As such, the equivocation ought to be resolved in favour of the accused.

[3] Evidence was not led from any of the four persons arrested pursuant to the information obtained from the accused, though they were all offered

as witnesses to the defence who declined the offer. If it was intended by the prosecution to show from the arrest of the said four persons that the accused was distributing and thereby trafficking in cannabis, it was essential and vital that oral, affirmative and direct evidence be led from at least one of the said four persons.

[4] The prosecution had established a case beyond reasonable doubt on an amended charge of possession of 64 g of cannabis under s. 6 of the Act, at the time and place as detailed in the original charge, thereby committing an offence punishable under s. 39A(2) of the DDA.

[Guilty and convicted to an amended charge under s. 6 DDA; 13 years of imprisonment & 10 strokes of the cane.]

Case(s) referred to:
Leong Bon Huat v. PP [1993] 3 CLJ 603 ***(refd)***
PP v. Alex Hamzani [1995] 3 CLJ 102 ***(refd)***
PP v Mohd Ambunami [1994] 4 CLJ 871 ***(refd)***
PP v. Saad Mat Takraw & Anor [1998] 3 CLJ 380 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 114g
Dangerous Drugs Act 1952, ss. 2, 6, 39A(2), B(1)

Other source(s) referred to:
Concise Oxford Dictionary, 8th edn

For the Public Prosecutor - Quah Siew Chin (Abdul Razak with him); DPP
For the accused - S. Devandran

Reported by Kavitha Gunasegaran

JUDGMENT

Vincent Ng J:

The accused was charged under s. 39B(1) of the Dangerous Drugs Act 1952 (the Act). The charge reads as follows:

> Bahawa kamu pada 4.2.98 jam lebih kurang 5.40 petang di pagar keselamatan berhampiran pintu TS 9/50, di dalam Daerah Kangar, di dalam Negeri Perlis telah mengedar dadah berbahaya iaitu 1346.6 gram cannabis dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (Disemak 1980) dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.
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> (the translation reads: That you on the 4th day of February, 1998 at about 5.40 p.m. at security fence near gate TS 9/50, in the District of Kangar, in the State of Perlis, did on your own behalf traffic in dangerous drug to wit 1346.6 grams

of cannabis and that you have thereby committed an offence under Section 39B(1) of the Dangerous Drugs Act 1952 (Revised 1980) and punishable under Section 39B(2) of the same Act.)

To build its case against the accused, the prosecution led evidence from eight witnesses in all, including the complainant Lance Corporal Abdullah bin Hamid (PW5) who was with Constable Ahmad bin Akun (PW6) at the time of the alleged offence. Besides the government chemist, Puan Eliza bt. Mat Nor (PW4), the Investigation Officer Chief Inspector Meor Azmi Shamsuddin (PW8), four other formal witnesses were called to give evidence and four were offered to the defence.

The facts of the prosecution case as narrated by PW5 are as simple as they are straightforward and uncomplicated. According to PW5, on 4 February, 1998 at about 5.40 p.m., while patrolling along the security road near the Thai-Malaysian security fence (pagar keselamatan) with PW6 riding pillion on a motorcycle, he spotted a Malay male (who was identified in court as the accused) walking inside the prohibited area (kawasan larangan) near POS TS 9/50 – a security post erected at certain intervals along the fence. The accused was seen holding in each hand a transparent plastic bag (exh. P10 and Exhibit P14) which contained a slab (in each bag) of dried leaves (exh. P12 and exh. P16), each wrapped in a plastic sheet (exh. P11 and exh. P15), and walking towards the security road. It was not seriously challenged that members of the public were prohibited from using that area without proper permission from the relevant authority.

On spotting the accused, PW5 stopped his motorcycle and walked towards the latter while shouting, "Hai Mat! Apakah kau buat kat situ?" ("Hai Mat! What are you doing here?") On hearing this, the accused turned around and ran towards the security fence and threw away both the plastic bags (exh. P10 and exh. P14) he was carrying, which fell on top of grass and small plants. Both PW5 and PW6 saw the accused throwing exhs. P10 and P14 which, according to PW5, landed on the left side of where the accused stood. PW5 immediately gave chase and arrested the accused. While PW5 was trying to arrest the accused, the latter tried to struggle and break free, until PW5 warned him, "Jangan melawan dan cuba melepaskan diri!" PW5 then directed PW6, who stood in front of him, to recover the two plastic bags. When PW6 went for the two plastic bags, he noted that there was nothing else in the vicinity. PW6 brought the bags back to PW5, and when the bags were opened in front of the accused they found each to contain a slab of compressed dried leaves (exhs. P12 and P16) suspected to be cannabis, wrapped in transparent plastic.

PW5 and PW6 brought the accused and the bags to POS TS 10 and reported this incident to their officers. They were then directed to bring the accused and the bags to the Padang Besar Narcotic Office. At the office, PW5 handed the accused and the bags together with the contents to the Investigation Officer, Chief Inspector Meor Azmi Shamsuddin (PW8). PW5 also made a police report (exh. P18), and prepared a search list (exh. P19) which was served on the accused. From the place of recovery to Pos T.S. 10, P10 and P14 with contents were under the care and custody of PW6 and from Pos T.S.10 to the narcotic office the same drug exhibits were under the custody and care of PW5. Both PW5 and PW8 then immediately marked the respective plastic bags and their contents at the office of PW8.

PW8 sent exhs. P10 and P14 and their contents exhs. P12 and P16 to a government chemist, Puan Eliza bt. Mat Nor (PW4) for analysis and upon analysis exhs. P12 and P16 were found to be cannabis as defined under s. 2 of the Act, bearing a total weight of 1346.6 grams.

After carefully studying the evidence led by the prosecution I found that a *prima facie* case as per the original charge had been made out and called the accused to enter upon his defence. Both sides did not make any submission at the close of the prosecution's case.

The accused, who took to the witness stand gave the following story. Before his arrest, he was a wireman, aged 26, residing at No. 52, Lot 12, Felda Mata Ayer, Padang Besar Utara, Perlis (the house). His father, one Sabu @ Omar bin Bidin, owns a plot in Felda Mata Ayer where the house was located. His father was then in Malacca to celebrate Hari Raya and had instructed him to guard his (the father's) rubber estate against fire in his absence during the dry season. At about 3.30 p.m. on 4 February 1998, he proceeded, riding pillion on a motor cycle with one Encik On as rider, from the house to the scene of the alleged crime to inspect his father's rubber estate for any occurrence of fire. Encik On, of Malay descent, was known to him for only six months. Neither the full name of Encik On nor his precise address was known to the accused. He reached his father's rubber estate at 4.00 p.m., got down from the motorcycle to inspect the rubber estate and left Encik On in a pondok in the estate, which was around 10 acres in area. He carried out inspection for around 15 minutes, when he heard the sound of a motor cycle (police motor cycle) from the direction of the security road, with two forest-police personnel riding on it towards his direction. When they reached him, the rider of the police motorcycle waved at him and said: "Mat, mai sini". He then approached them and the said rider then asked him: "Mat, hang buat apa di situ?", and he replied that he was making his rounds to inspect his rubber estate. Soon thereafter the said rider got down from the police motorcycle and immediately caught hold of the back of his shirt collar. After

that the said rider instructed the pillion rider to search the side of the security fence. The said police motorcycle rider and the pillion rider were respectively known to him as Abdullah bin Hamid (SP5) and Ahmad bin Akun (SP6). SP6 took around one minute to search the area, while the accused was made to squat, with SP5 holding the back of his shirt collar. The accused then saw SP6 bringing along one white plastic packet towards his direction. When exhs. P10 and P14 were shown to him he said that the white plastic bag that he saw (on the day in question) brought back by SP6 after his search did not look like either exhs. P10 or P14. He then heard SP6 informing SP5, while pointing to the white plastic packet: "Ini ganja". SP5 then asked the accused: "Bungkusan siapa yang punya" and he replied: "Saya tidak tahu siapa yang punya". SP5 then told the accused not to be frightened since that thing ("barang itu") did not belong to him. However, SP5 said that it was necessary for the accused himself to meet their (SP5 and SP6) superiors for him to be released. He then followed SP5 and SP6 to the security post. Upon arrival there, he was handcuffed and both SP5 and SP6 left him at the security post. Thereafter the accused was brought to police camp at Padang Besar and then to Balai Polis Padang Besar. The accused was also not at any time shown the contents of the white plastic bag recovered by SP6. The accused said that the first time he saw exhs. P12 and P16 was at Balai Polis Padang Besar and both exhibits did not belong to him as he had never held nor touched exhs. P10 or P14.

The accused only called his father as his sole witness. His father Encik Sabu @ Omar bin Bidin confirmed that he left for Malacca on 3 February 1998 and he was a Felda Mata Ayer scheme settler since 1984, in which scheme he held a rubber estate. He did not know where his son was arrested on that fateful day but confirmed that the latter was arrested during the dry season. He did instruct his son, to guard his rubber estate, which was located near the place his son was arrested, because he was afraid of an outbreak of fire in his estate. He said that he had five children, all of whom except the accused, who stayed with him, were married.

The defence first sought to impugn the credibility of PW5 and PW6. At the close of the case for the defence, counsel for the accused submitted that the testimony of PW5 had contradicted PW6 and both could not be believed, as PW5 had told the court the accused had turned his body before throwing the exhibits to his left side and tried to run away, while PW6 said that the accused threw the exhibits to his right before turning around to run away. The slightly different version as to whether the plastic bag were thrown to the right or left of the accused depended on whether the accused had turned around before throwing the exhibits or had thrown the exhibits and then turned around. Such discrepancies if any, I find to be minor in nature and it only goes to reflect

that the prosecution witnesses were truthful witnesses as it would be difficult for the witness to recollect every detail of an event which occurred some considerable time earlier. Hence, the crux of the testimony of both PW5 and PW6 that they saw the accused carry P10 and P14 and throw them away before PW5 arrested him was not in any way demolished.

An issue was also raised on the different markings on the photograph exh. P7(C) by PW5 and PW6 respectively, to indicate the spot where the drug exhibits had landed. I find that the two markings on the photograph by the two witnesses were quite near to each other, and on the same side of the road, and in any event both of them had marked the same spot on another photograph exh. P20, as the spot where the drug exhibits had landed.

The accused told the court that he was walking along the security road when he saw PW5 and PW6. This aspect of his defence was an afterthought as it was never put to PW5. In fact, what was put to PW5 was whether he would agree that the accused was at prohibited area for the sole purpose of inspecting his father's rubber estate. To this question, PW5 vehemently disagreed and, quite pertinently, further added that if the accused had in fact wanted to inspect the estate, he would be found or seen within and not outside the boundary of the estate. Also, I find the alleged character 'Encik On' to be (to repeat a hackneyed phrase) a fictitious figment of the accused's fertile imagination and an afterthought as it was never raised or put to the prosecution witnesses. It was raised only at the defence stage.

The defence need only to cast a reasonable doubt on the prosecution case but his story, that he was at that material time in his father's rubber estate solely on an inspection tour to scout around for fire, was hard to believe as the accused did not bring any fire fighting equipment or aids with him to the estate. And, even though during his re-examination the accused told the court that a hut found inside the estate housed those equipment, this was not supported by DW2.

Clearly, the sum total of accused's defence constituted a bare denial. His story is not credible and is incapable of raising even a reasonable doubt in the court's mind in regard to the circumstances of his apprehension and arrest. There was a small divergence between the evidence of PW5 and PW6, as one would expect even from witnesses of truth who may not be endowed with the faculty to recollect every single detail of the event accurately and in perfect harmony or corroboration with one another. Observing the manner in which they had narrated their story, both SP5 and SP6 have struck me as not very smart witnesses, who were by that turn of nature more inclined to tell-it-as-they-see-it. The accused had himself admitted in cross-examination that both PW5 and PW6 were virtual strangers to him and they bore no grudge against

him. Indeed, he admitted that PW8 (the I.O) was also unknown to him. I do not see how and why three (3) strangers to him would want to conspire to frame him. This brings me to the next challenge mounted by the defence.

The accused said that the first time he saw exh. P10 and exh. P14, containing the offending compressed dried leaves wrapped in plastic sheets was when it was first produced in court. I find, and I am completely satisfied that exh. P10 and exh. P14 was in the possession and custody of the accused with full knowledge of its contents, namely exh. P12 and exh. P16 wrapped in exh. P11 and exh. P15, before he threw them, in full view of PW5 and PW6, when they confronted him. It was never the accused's contention that there were other people in the vicinity of offence at the material time – not forgetting that he was then found in a prohibited area very near the security road at the Malaysian/Thailand border. And, after having anxiously considered the evidence of PW1, PW8 and PW4, I am also satisfied that there was no break in the chain of custody in handling the drug exhs. (P12 and P16) which were wrapped and contained in the plastic bags as aforesaid, and they were the very exhibits seized from the accused on the day in question.

I shall now turn to the final point raised by the defence, to wit: in the event that this court finds that the accused had custody, control and knowledge of the drug exhibits, the accused could only be convicted of an offence under s. 39A(2) of the Act, upon the authority of *PP v. Saad bin Mat Takraw & Anor* [1998] 3 CLJ 380; [1998] 3 MLJ 784; *PP v. Mohd bin Ambunami* [1994] 4 CLJ 871 and *PP v. Alex bin Hamzani* [1995] 3 CLJ 102.

It is now well settled and trite that the elementary nature of the substance of the alleged offending exhibits has to be proved to the high standard of beyond reasonable doubt. It is also pretty well settled, in a welter of case authorities [see *Leong Bon Huat v. PP* [1993] 3 CLJ 603] and indeed, generally from the expert evidence of the government chemists themselves, that the first two tests (visual inspection and microscopic tests) are not conclusive. And, it is only through the positive results obtained *via* the third and fourth tests (Dequinois-Levine and Thin Layer Chromatography tests) that enable such chemists to conclude that the offending exhibits are cannabis as defined under s. 2 of the Act. This proposition stands to sound reasoning and good sense, for otherwise it would be a waste of time and utter futility of purpose for government chemists to proceed to conduct the third and fourth tests in order to establish beyond doubt their findings. The expression 'not conclusive' and 'conclusive' in the language of government chemists if translated into jurisprudential expression could only mean '*prima facie*' and 'beyond reasonable doubt'. It is for this reason that I had earlier found the prosecution had made out a *prima facie* case of having custody and control of 1346.6

grams of the offending plant material P12 and P16. But the question for final determination is: what quantity or weight of P12 and P16 has been proved beyond doubt to be cannabis as defined under s. 2 of the Act.

PW4 said that she had carried out the 3rd and 4th tests on 64 grams of the plant material comprised in 64 random samples taken from exhs. P12 and P16. Yet, the learned DPP, contended that, as she had also said that she had microscopically examined (the second test) the whole of the plant material in P12 and P16, this test combined with the 3rd and 4th test would be sufficient to prove beyond reasonable doubt that the 1,346.6 grams of the plant material P12 and P16 is cannabis as defined in s. 2 of the Act. Even in the event that this court could accept this contention (which it does not) it is necessary to meticulously examine her evidence upon a fairly high standard of probity. According to her, when questioned in her examination in chief, she had conducted the microscopic examination (second test) of the 'sampel' (in Bahasa Malaysia) of the plant material, but later, when clarification was sought by this court she said, by the word 'sampel' she meant the whole of the plant material in P12 and P16 that was handed to her by the investigating officer (PW8). Unfortunately, it has not escaped the court's attention that this word 'sampel' was also uttered by her when she said: "jumlah berat keseluruhannya sampel wakilan lebih kurang 32 gram. Dari setiap sampel wakilan ID12 dan ID16 saya telah mengambil 32 sampel". Thus, the word 'sampel', which is not defined in a Malay dictionary, would appear to have been used by PW4 to convey two very different meanings. The *Concise Oxford Dictionary* (8th edn) defines the word sample as: 'a small part or quantity intended to show what the whole is like'.

Hence, whether only 64 grams of, or the whole of exh. P12 and P16 was examined microscopically is now in doubt, and it is trite that in such situation the equivocation ought to be resolved in favour of the accused. I consider it highly improbable that she had in fact examined, with a microscope, in myriad minute quantities, the whole of the 1,346.6 grams of the plant material. From her demeanour and the manner in which she gave her evidence on this aspect of her tests, this court is not inclined to believe her. Any student of science would concede that it is a laborious task, that may take many days, to place and examine in dribs and drabs, 1,346.6 grams of plant material under the microscope. Since such is her contention, it is vital that she gives details – which was not forthcoming – about how she achieved this laborious task, so as to persuade this court to believe her. Considering the fact that this chemist may in all probability have many other drug exhibits from other cases to examine at the material time, it is more than likely, and I would accept that, she had carried out the 2nd, 3rd and 4th tests only on 64 grams of the plant material. Indeed, the impression created in the court's mind when PW4 gave

her evidence was that she may have tailored her evidence to bring this case out of the ambit of the ratio in the aforesaid four cases – though I must hasten to add, only on the issue of the second test. If what she said was true then the obvious question that would arise is: would it not by far be less laborious and time consuming to put at least 200 grams of the plant material in several test tubes to carry out the third and fourth chemical tests than to put 1,346.6 grams under the microscope between slides?

All government chemists who have had occasion to appear before me in recent years in various 39B cases in the past, including Encik Khairuzzaman bin Mustafa, Puan Eliza bt. Mat Nor (PW4 in the current case) and Mr Sim Hock Lye, a very senior and experienced chemist, have enlightened the court with the following similar answers to the mantra-like questioning from defence counsels in drug trials on the nature of cannabis, namely: (a) that other plants e.g. hops also display, under the microscope, systolitic and glandular hairs similar to cannabis; and, (b) it is precisely for this reason that the first and second tests could only enable them to conclude to a degree of probability that the plant material is cannabis; (c) that nutmeg would produce the same colouration in 'DLT' test, which may be misconstrued as a positive reaction, though nutmeg will not give a positive reaction with the 'TLC' test; (d) thus, they would also have to undertake the 'TLC' test to enable them to arrive at a conclusive (beyond reasonable doubt) decision as to whether a plant material is cannabis as defined in s. 2 of the Act. Such chemists have also readily agreed that no practical problem would be encountered in carrying out the third (DLT) and the fourth (TLC) tests on 200 grams of cannabis. Indeed, this is often done where the 32 representative samples taken from a cannabis exhibit in a given case – where the amount is substantial – weigh well over 200 grams. The procedure entailed in the two tests being: to subject 200 grams to solvent extraction with the aid of petroleum ether; the resultant extract is then divided into two portions; the first portion of the liquid extract is evaporated to dryness and the Duquenois Levin Test (DLT) is performed by adding the Duquenois reagent followed by hydrochloric acid, which should produce a sequence of colour changes initially from colourless and finally to violet, and thereafter a solvent called chloroform is added, and if the violet colour could be eluted into the solvent, a positive reaction is shown; the other portion of the liquid extract is then subjected to the Thin Layer Chromotography test (TLC) whereby, the components in the liquid extract is separated on a T.L.C. plate (coated with powdered silica gel) using a mobile solvent of petroleum ether and ether, and if the components are identified as cannabinoids using a visual reagent called Fast Blue 2B, then it would positively prove the presence of tetrahydrocannabinol, cannabitiol and cannabinol in the liquid extract; and, a positive reaction in both the DLT and TLC tests would enable the chemists to conclude beyond doubt that the plant material is of the genus cannabis, as

no other plant material is known to exhibit such reaction in both the tests taken individually. The analysis of cannabis is quite different from the analysis of heroin. The singular objective of heroin testing by a government chemist is to quantify the active ingredient in the whole mass/weight or amount of the heroin exhibit, after the whole amount of the exhibit has been made homogeneous by grounding, pulverizing into powder and blending, and taking 21 representative samples of the homogeneous blended powder for such quantitative testing. Whereas, given that cannabis is in the nature of a plant material which is wholly impracticable to homogenize through grinding and blending its whole bulk or mass, it permits only qualitative analysis.

Evidence was also led from the investigating officer to the effect that from the telephone number obtained from the accused he made a call, and from this call he discovered that the handphone number belonged to one named Jamal. And, upon further investigations and based upon information received from the accused he arrested four persons, two of whom were urine-tested positive for cannabis. Apparently, from this evidence, the prosecution had sought to infer that the accused was, during the material period or thereabouts, distributing cannabis to certain persons and hence trafficking in cannabis.

However, for reasons better known to the prosecution, evidence was not led from any of these four persons, though they were all offered as witnesses to the defence, who declined the offer. In this regard, I would hold that, if it was indeed intended by the prosecution, to show from this piece of evidence, that the accused was distributing and thereby trafficking in cannabis, it is crucially essential and vital that oral, affirmative and direct evidence be led from at least one of the four persons to establish such distribution and therefore trafficking. It is trite law that all essential ingredients of a charge have to be proved by affirmative evidence from the witness stand, and it is not sufficient merely to offer such witnesses to the defence. Section 114g of the Criminal Procedure Code is obviously designed to be used as the prosecution's shield and not as its sword. To hold otherwise would sanction an absurd scenario where, in a hypothetical case, prosecution could call out all their witnesses, including material witnesses, narrate to the court what sort of evidence each witness would give, and then offer them to the defence, and should the defence elect to remain silent and decline to call any of such witnesses offered, the prosecution could then require that the accused be convicted as charged.

To conclude, after careful consideration of all the evidence heard during the trial, and submissions by the prosecution and the defence, and for the reasons above adumbrated, I found that the prosecution has established a case beyond reasonable doubt on an amended charge of possession of 64 grams of cannabis

under s. 6 of the Act, at the time and place as detailed in the original charge, thereby committing an offence punishable under s. 39A(2) of the Act.

In the result, after the amended charge was read and explained to the accused, he was found guilty and convicted on the aforesaid amended charge of possession of 64 grams of cannabis and sentenced him to serve 13 years of imprisonment with effect from the date of his arrest and to receive 10 strokes of the cane. This court is totally convinced that the accused has not raised a reasonable doubt in regard to the said amended charge of possession which he had been found guilty of.